



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 57 'B' OF 2011

In the Matter of the Estate of Mutungi Rithara Alias M' Mutungi M' Rithara (Deceased)

PETER MURIUKI MUTUNGI.....PETITIONER

-Versus-

STEPHEN MURITHI MUTUNGI

SILAS MARETE MUTUNGI

JANE NTARARA MUTUNGI

MIKIELINA KARWIRWA..APPLICANTS/PROTESTORS

JUDGMENT.

[1] These proceedings relate to the estate of *Mutungi Rithara alias M' Mutungi M' Rithara (Deceased)*. The deceased had two houses and his children are:-

1ST HOUSE: ZIPPORAH CIOUTHURI (DECEASED)

- 1. Gerevasio M'Rukunga- son (deceased)*
- 2. Edward Mutuma- son (deceased)*
- 3. Margaret Mwariumwe- Daughter*
- 4. Goerge Mutethia- son (deceased)*
- 5. Florence Kainda- daughter and*
- 6. Francis Kithara*

2ND HOUSE OF MUKIRI MUTUNGI (DECEASED)

- 1. Jeniffer Nkirote- daughter*
- 2. Peter Muriuki- son*
- 3. Stephen Murithi- son and*
- 4. Silas Marete- son*

[2] I am now considering a Summons for Confirmation of Grant filed in court on 11th December 2015. In the Summons, the Protestors have sought to distribute the estate of the deceased as follows;

(a) L.R NO. NYAKI/MUNITHU/612 (0.7Ha) to be shared equally among:-

1. Peter Muriuki Mutungi
2. Stephen Murithi Mutungi
3. Jane Ntarara Mutungi
4. Silas Marete Mutungi
5. Makielina Karwira Muteithia
6. Elisah Kimathi

(b) L.R NO. RUIRI/RWARERA/472 (5.08 Acres) to be shared by;

- (1) Jane Ntarara Mutungi- 1 Acre
- (2) Amos Kubania Muriuki- Balance

[3] The Protestors argued in the submissions that the Petitioner had in his proposed mode of distribution dated 17th February 2016, sought a bigger share of the estate of the deceased by alleging that he had bought part of the land from some of the beneficiaries of the estate of the deceased. He confessed that he purchased the land before the grant was confirmed by court. The Protestors therefore submitted that the scheme of distribution of the estate by the Protestors as set out in the Summons for Confirmation of the Grant dated 10th December 2015, was fair, equitable and just to all the beneficiaries and urged the court to allow it and disregard the proposal by the Petitioner which was unfair and inequitable to all the beneficiaries.

The petitioner's case

[4] The 1st Petitioner opposed the proposed mode of distribution by the Protestors. He filed an affidavit on 2nd March 2016, proposing to distribute the estate of the deceased as follows;

a) L.R NO. NYAKI/MUNITHU/612

Peter Muriuki Mutungi

b). L.R NO. RUIRU/WAWERA/472

Peter Muriuki Mutungi

[5] When the matter came up for hearing on 11th October 2017, the court directed that distribution be distributed by way of *viva voce* evidence. Parties obliged.

[6] The 1st Petitioner's case was that his deceased father had 3 *shambas* namely No. 104, 612 and 472. According to him, No. 104 was in the name of Maregi M' Manyara (his father in-law). He stated that his father had given Edward Mutuma (his deceased brother) this land and that the same was now being used by his children. It was his further evidence that LR No. 612 should be given to him because; (1) all the other beneficiaries had sold the said land to him; and (2) Jane Ntarara, Makelina Mutethia and Elizabeth Kimathi were not his siblings. Jane was his sister's daughter called Jenifer Nkirote while Makelina was daughter to the late John Muteithia who was his brother. And, Elizah Kimathi was a son to his brother called Francis Kithara

[7] On L.R No. 472/Ruiri he contended that the land should be given to him also so that he can distribute it to 4 people namely; himself, Cyrus Marete, Stephen Murithi and his sister.

Submissions by 1st petitioner

[8] The 1ST Petitioner submitted in support of his proposals. He urged that L.R Nyaki/Munithu /612 should be taken by him alone since his brothers sold their shares of the said land to him after it was shared among them. About L.R No. Ruiri/Rwarera/472, the Petitioner contended that he should take this share alone since the 2nd Petitioner was given 5 acres from L.R No. Ruiri/Rwarera/5121 while Silas Marete Mutungi was given 5 acres from Ruiri/Rwarera and it was only fair for him to take L.R Nyaki/Munithu/612 which was his father's share. It was further submitted that the 1st Protestor had not denied that he had ever sold part of the land which compromised of the estate of the deceased and the 1st Petitioner urged the court to find that indeed the 1st Protestor had sold his share to the 1st Petitioner.

Analysis and determination

[9] With absolute keenness, I have considered the proposed mode of distribution by the 1st Petitioner and the Protestors. The estate of the

deceased comprises in:-

a. L.R NO. Nyaki/Munithu/612 and

b. L.R No. Ruiru/Rwarera/472.

The 1st Petitioner proposed to distribute the entire estate to self, for reasons, *inter alia* that the 1st Protestor had sold to him part of land in the estate of the deceased. He however did not provide details of the alleged sale of land. He further contended that the deceased had given the other beneficiaries land during his lifetime. Again, he did not provide evidence in these allegations. I note that the Protestors neither denied nor admitted having sold their portions to the 1st Petitioner. They, however, submitted that the Petitioner had breached the provisions of Section 45 of the Law of Succession Act by seeking to buy part of the estate of the deceased before Confirmation of the Grant.

Of sale of immovable property before confirmation

[10] From the arguments presented, Section 82 of the Law of Succession Act on sale of immovable property of the estate before confirmation of grant becomes relevant. The relevant part thereof provides as follows;

82 Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that:-

i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii. no immovable property shall be sold before confirmation of the grant;"(Emphasis supplied)

[11] I am content to cite few decisions on this subject. For instance, in the case of Muriuki Hassan .v. Rose Kanyua and 4 others [2014] eKLR, Makau J stated:-

"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

[12] More judicial decisions; In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held:-

"A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."

For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant." (Underlining mine).

[13] And more judicial authorities: In Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] e KLR, the Court held:-

"... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same." (Underlining mine).

[14] The jurisprudence emerging from the many judicial decisions on this subject is that any acquisition or conveyance of immovable property of the estate property or any part thereof in contravention of section 82 of the Law of Succession Act renders such acquisition or conveyance unlawful, and therefore, invalid in law. And unlawful acquisition will not only be null and void but is totally unenforceable. Such acquisition or conveyance confers nothing; passes no proprietary rights and is not protected under property rights. See article 40(6) of the Constitution that:-

40. Protection of right to property

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

In my view, as such would be acts of intermeddling falling under section 45 of the Act, the impugned transactions may not even be validated by consent of parties. In view of the foregoing and in light of the provisions of section 82 of the Law of Succession Act, the said sale of estate property by protestors is illegal, null and void *ab initio* for it was done before the Grant was confirmed. The 1st Petitioner cannot therefore purport to share the entire estate to self on the basis of an illegal transaction. I also hold that a distribution that vests the entire estate in one beneficiary to the exclusion of others is patently unfair and contrary to the law.

[15] The 1st Protestor proposed to give one Amos Kubania Muriuki the balance of L.R NO. Ruiri/Rwarera/472. Neither the 1st Petitioner nor the 1st Protestor has listed the said Amos Kubania Muriuki as a beneficiary of the deceased estate. It is therefore not clear who he is.

Of gifts inter vivos

[16] The 1st Petitioner claimed that the deceased had given the other beneficiaries land during his lifetime. He stated that he alone should take L.R No. Ruiri/Rwarera/472, as the 2nd Petitioner had been given 5 acres from L.R No. Ruiri/Rwarera/5121 while Silas Marete Mutungi was given 5 acres from Ruiri/Rwarera. This claim is one of gift inter vivos and one of the fundamental consideration in distribution of an estate. I say so as gifts *inter vivos* are taken into account in determining the share that the said beneficiary is ultimately entitled to in the estate. See sections 28(d) and 42 of the Law of Succession act below:-

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- (a) the nature and amount of the deceased's property;***
- (b) any past, present or future capital or income from any source of the dependant;***
- (c) the existing and future means and needs of the dependant;***
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime; [underlining mine for emphasis]***
- (e) the conduct of the dependant in relation to the deceased;***
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.***

42. Previous benefits to be brought into account

Where

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.***

[17] The law commands that a claim of gift *inter vivos* is an important consideration in distribution. It is however a matter of fact which must be proved. Accordingly, it is imperative that parties making such claims should take them seriously and tender proof thereof rather than make generalized statement devoid of evidence. I note that the 1st Petitioner claimed that, on the basis of the gifts *inter vivos*, it was only fair for him to take L.R Nyaki/Munithu/612 which was his father's share. He may or may not be stating the truth, but I comfortably find that he did not tender evidence to prove gifts *inter vivos* were made by the deceased. The claim fails.

Ultimately...

[17] Some of the children are deceased and their respective families shall take their shares. The 1st Protestor's proposal on distribution has been supported by the protestors as well as Florence Kainda Muiruri and Francis Mutungi. It also reflects fair distribution to the beneficiaries including those who have died. I therefore order that the estate of the deceased shall be distributed as follows;

- (a). L.R NO. NYAKI/MUNITHU/612 (0.7Ha) to be shared equally among;-***

1. Peter Muriuki Mutungi

2. Stephen Murithi Mutungi

3. Jane Ntarara Mutungi

4. Silas Marete Mutungi

5. Makielina Karwira Muteithia

6. Elisah Kimathi

(b) L.R NO. RUIRI/RWARERA/472 (5.08 Acres) to be shared equally among;

1. Peter Muriuki Mutungi

2. Stephen Murithi Mutungi

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4. Silas Marete Mutungi

5. Makielina Karwira Muteithia

6. Elisah Kimathi

[18] As I stated earlier, no one has told this court who **Amos Kubania Muriuki** is. But, before delivery of this judgment, the court sought for information from Petitioner on Amos. And, the Petitioner stated that he is his son. I still do not find anything to suggest that Amos was a beneficiary of the estate of the deceased. I therefore, remove him from the list of beneficiaries. This being a succession matter, I make no order for costs.

Dated, signed and delivered in open court at Meru this 2nd day of October 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kaimenyi advocate for petitioner

M/s. Wanjohi advocate for petitioner

F. GIKONYO

JUDGE